Nos. 82-1331 and 83-1352

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents,

and

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, THE PEOPLE OF THE
STATE OF CALIFORNIA AND THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF
CALIFORNIA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
ET AL.,
Respondents.

IN SUPPORT OF
PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS AS AMICUS CURIAE

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April 15, 1983

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The South Carolina Department of Consumer Affairs "Department" respectfully moves for leave to file the attached brief amicus

curiae in support of the request of the Petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, et al. (Case No. 1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the Petitioners to the filing of a brief amicus curiae by the Department has been obtained. The consent of Respondents Federal Communications Commission and the United States of America to the filing of a brief amicus curiae by the Department has also been obtained. These letters of consent accompany this brief and are being filed in the Office of the Clerk. The brief is being submitted in a timely manner and in compliance with Supreme Court Rule 36.1.

The interest of the Department in this matter results from its statutory authority

to represent the interests of South Carolina consumers in civil proceedings involving review of telephone and other matters which may affect South Carolina consumer interests. S.C. CODE ANN. §37-6-607 (Cum. Supp. 1982). The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission is to curtail the ability of South Carolina and other states to secure for telephone users quality service at reasonable rates. Accordingly, the Department is best qualified to represent the interests of South Carolina ratepayers who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

WHEREFORE, the Department prays for leave to file a brief amicus curiae in support of the Petitions for a writ of

certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The Department is an agency of the State of South Carolina. The Consumer Advocate and Division of Consumer Advocacy within the Department have been created to protect the interests of South Carolina's users of telephones and other services in civil proceedings involving review or enforcement

of an agency action that may substantially affect such interest of consumers. S.C. CODE ANN. §37-6-607 (Cum. Supp. 1982). The Consumer Advocate likewise provides legal representation at his sole discretion of consumer interests before the South Carolina Public Service Commission ("SCPSC") when it undertakes to fix rates or prices for consumer telephone products or services or to enact regulations or establish policies related thereto. S.C. CODE ANN. §37-6-604 (Cum. Supp. 1982). Because the Federal Communications Commission ("FCC") has preempted State regulatory authority to tariff customer premises telephone equipment, and the United States Court of Appeals for the District of Columbia has upheld this action,[1] the interests which the Department is statutorily obligated to protect are significantly and unquestionably affected. The FCC has since issued certain orders in which it has expanded this notion of its preemptive authority.[2]

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[1] Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2d 198 (D.C. Cir. 1982) ("Computer II"). Review is sought for this case and in the six cases consolidated therewith, as cited in the petitions for a writ of certiorari. The case began as an FCC rulemaking proceeding.

[2] Memorandum Opinion and Order In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the

If this decision is allowed to stand, it will continue to have serious consequences by precluding the Department from urging the SCPSC to continue to exercise its lawful authority regarding the tariffing of customer premises equipment ("CPE") and the setting other telephone rates, charges, and methodologies for intrastate ratemaking purposes as intended by both the SCPSC telecommunications statutes and the Communications Act of 1934. S.C. CODE ANN. §58-9-10 et seq. (Law Co-op. 1976) and 47 USC §151 et seq. (1976).

Finally, the Department's interest will not be adequately represented by existing parties. Respondents FCC and the United States of America seek denial of the petitions for writ of certiorari. This is obviously adverse to the Department's statutory interest regarding intrastate rates for telephone service. Petitioners are either state public utilities commissions or the State's National

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Commission's Rules and Regulations with Respect to Accounting for Station Connections, Optional Payment and Planned Revenues and Related Capital Costs, Customer Provided Equipment and Sales of Terminal Equipment, CC Docket No. 79-105 (RM-3017), FCC 82-581 (released January 6, 1983) (preempting State depreciation charges) ("Reconsideration Order") and Third Report and Order In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 82-579 (released February 28, 1983) (imposing a flat access charge on non-interstate callers) ("Third Report"). See Separate statement in Third Report of Commissioner Anne P. Jones, issued April 4, 1983; but see United States of America v.American Telephone and Telegraph Company, 552 F.Supp. 131, 169, n. 161 (D.D.C. 1982).

Association of Regulatory Utility Commissioners ("NARUC"). As such, petitioners must balance the interests of telephone consumers and the interests of the telephone utilities in ratemaking decisions. Thus, only the Department as amicus curiae can adequately represent the interests of South Carolina consumers of telephone service. The Department is honored to have the opportunity to support the issuance of a writ of certiorari in a case of such significant historical importance and with such wide-ranging social ramifications.

SUMMARY OF ARGUMENT

There are at least three special and important reasons that the Court should issue a writ of certiorari. First, the Court's supervision is necessary to provide guidance in light of the court of appeals affirmance of the FCC's extreme departure from its historical interpretation of the extent of its ancillary jurisdiction under the Communications Act of 1934. Second, the legislative history of the Act may not support FCC preemption of State tariffing of CPE. Third, by its affirmance of the preemption ruling the court of appeals has effectively rendered a decision in which its reasoning may conflict with the reasoning in two decisions by the Fourth Circuit Court of Appeals interpreting the Communications Act of 1934.[3]

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[3] North Carolina Utilities Commission v. Federal

ARGUMENT

I. THIS COURT'S GUIDANCE IS NECESSARY TO CLARIFY THE EXTENT OF THE FCC'S ANCILLARY JURISDICTION UNDER THE COMMUNICATIONS ACT.

The Court's supervision is necessary to provide guidance in light of the court of appeals affirmance of the FCC's extreme departure from its historical interpretation of the extent of its ancillary jurisdiction under the Communications Act of 1934. In its order setting forth policy reasons for affirming the FCC's preemptive ruling, the court of appeals has not included sufficient underlying facts to support its reasoning. Therefore, remand of this case may be necessary before the Court can offer specific guidance. The need for guidance on this important question of statutory construction of Federal law, however, it made more acute due to more recent FCC decisions concerning depreciation (Reconsideration Order) and access charges (Third Report) by which the Federal agency is continuing to expand its jurisdiction under the Act.

The Court granted certiorari in United States v. Southwestern Cable Co., 392 U.S.

Communications Commission, 537 F.2d 787 (4th Cir.), cert. denied, 419 U.S. 1027 (1976) ("NCUC I") and North Carolina Utilities Commission v. Federal Communications Commission, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) ("NCUC II").

157, 88 S.Ct. 1994 (1968), to consider an important question of the FCC's regulatory authority under the Communications Act emanating from rules the FCC had promulgated. 392 U.S. at 160-161. The Court reversed the holding of the Ninth Circuit Court of Appeals that the FCC lacked authority under Section 152(a) of the Act to issue an order prohibiting expansion of a television station's community antenna television (CATV) systems, although the Court stated it was restricting the authority it was recognizing "to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. The need for the Court to clarify the extent of the FCC's jurisdiction under §152(a) has once again arisen because of its action, affirmed by the court of appeals, preempting State tariffing of CPE.

Section 152(a) states that the "provisions of this chapter shall apply to all interstate ... communication by wire or radio ...," while §153(a) defines "communication by wire" to include not only transmission but also "all instrumentalities, facilities (and) apparatus ... incidental to such transmission." 47 U.S.C. §§152(a) and 153(a) (1976).

On the other hand, Section 152(b) states in part:

> Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

47 U.S.C. §152(b) (1976).[4] In addition, Section 221(b) excludes State regulated jointly-used equipment from the FCC's jurisdiction:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classification, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. §221(b) (1976).

In the Computer II scheme, discontinuation of Title II regulation of CPE and exertion of ancillary jurisdiction under Sections 152 and 153 over carrier-provided CPE by the

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[4] Section 224 concerns pole attachments and Section 301 concerns licenses for radio communication or transmission of energy, i.e. broadcasting.

FCC is one thing, while FCC preemption under these Sections over historically State regulated CPE is quite another. The Court should clarify how Sections 152 and 153 and 221(b) should be read individually and collectively and thereby clarify the extent of the FCC's ancillary jurisdiction under the Act.

The Department agrees with the court of appeals that the field of telecommunications is "volatile and highly specialized." Computer II, 693 F.2d at 209. It seriously doubts, however, whether the broad authority given the FCC under Section 152(a) can be expanded by policy reasons because of the volatile evolution of this field or because it determined the FCC's regulations were not arbitrary or capricious (Id. at 217), especially in light of the express language of Sections 152(b) and 221(b). Even if the court is inclined to consider how the definition of terms in these Sections may change in the volatile field of telecommunications, the Department then questions whether the Court can offer proper guidance without additional facts - if they are in the record - to support the court of appeals affirmance of the FCC's expanded definition of its ancillary jurisdiction. Remand may be necessary to determine more clearly: exactly how state tariffing of CPE

would frustrate the Computer II scheme (Id. at 214); how the inclusion of CPE in charges for intrastate transmission service will "certainly influence the consumer's choice of CPE" (Id. at 215); whether the FCC's belief is supportable that state tariffing of CPE is detrimental to both the consumer and the interstate communication system (Id. at 215); and what the impact will be if the telephone operating companies after divestiture begin to sell CPE through some new subsidiary or otherwise.[5] Even with this additional information, however, the Court might ultimately decide legislative changes to the Act would be necessary to clarify the Federal-State jurisdictional line.

Finally, guidance is needed since the FCC has already used the Computer II preemption notion as a springboard in two other decisions, the Reconsideration Order and Third Report, both decided in early 1983. Appeals have been filed in both of these matters. Virginia State Corporation Commission v. Federal Communications Commission and United States of America, Civ. No. 83-1136 (4th Cir., filed February 15, 1983) (challenging FCC

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[5] As to divestiture See United States of America v. American Telephone and Telegraph Company, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland et al. v. United States, et al., 51 U.S.L. W. 3632 (U.S. Feb. 28, 1983) (Nos. 82-952, 82-953, 83-992, and 81-1001).

preemption of State depreciation rates) and National Association of Regulatory Utilities Commissioners v. Federal Communications Commission and United States of America, Civ. No. 83-1225 (D.C. Cir., filed March 1, 1983) (challenging FCC establishment of access charge regulations).

II. THE LEGISLATIVE HISTORY OF THE ACT DOES NOT SUPPORT A CONSTRUCTION THAT ALLOWS PREEMPTION OF STATE TARIFFING OF CPE.

Petitioners have amply shown through the statements of Senator Clarence Dill, Representative Sam Rayburn, and others that Congress intended to deny the FCC any power to interfere with State regulation of rates and charges incidental to intrastate communications service. Petition of NARUC at 4-7 and Petition of Louisiana Public Service Commission at 24. This Court has previously held that unambiguous preemptive intent must flow from Congress. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210 (1963).

Even the court of appeals recognized the Congressional intent behind Section 152(b) of the Act. As the court explained:

> Several parties attempt to distinguish the NCUC cases on the ground that they did not involve Commission attempts to preempt state ratemaking authority. They argue that section 2(b) prohibits preemption of state tariffing of CPE. They

> point out that section 2(b) was designed to protect state authority over intrastate rates, enacted as it was in response to a Supreme Court decision that Congress feared would be read to permit federal agencies to set local rates based on the indirect effects such as rates might have on interstate service.

Computer II, 693 F.2d at 215-26, citing Houston, East & West Texas Railway Company v. United States, 234 U.S. 342, 34 S. Ct. 883 (1914) (Shreveport). The court then noted:

> (I)n Shreveport the Supreme Court upheld an ICC order that, in effective, required the revision of intrastate railroad rates that were lower than rates for comparable interstate rail services so as to remove the resulting discrimination against interstate commerce. Congress may well have intended §2(b) of the Communications Act to prevent such a result in the communications area.

693 F.2d at 216, n. 99 (emphasis added).

From this recognition, then, the clearest inference is that the court of appeals was somewhat uncertain about how much this legislative history affected its ability to handle the question of the FCC's ancillary jurisdiction. The Court should therefore resolve this uncertainty by clarifying the matter itself or by suggesting that Congress do it.

III. THE REASONING PROCESS EMPLOYED BY THE COURT OF APPEALS TO REACH ITS DECISION UPHOLDING PREEMPTION MAY CONFLICT WITH THE

PROCESS UTILIZED BY ANOTHER CIRCUIT IN CONSTRUING THE COMMUNICATIONS ACT.

In NCUC I and NCUC II the Court of Appeals for the Fourth Circuit examined an FCC plan to exercise its authority over customer-provided terminal equipment to be interconnected with the interstate network. The Fourth Circuit upheld the registration program as a valid exercise within the FCC's statutory jurisdiction. In reaching this determination the court reviewed the scope of Section 152(b) of the Act, as well as the legislative history and implications of Federal control over interconnection. It noted:

> Shreveport dealt specifically with rates for services which were admittedly local in nature; this appeal concerns the definition of what services and facilities are "intrastate" and hence subject to state rather than federal control (under Section 152(b)(1)).

NCUC II, 552 F.2d at 1047. Thus, while upholding the FCC's registration program, the Fourth Circuit effectively reasoned that it was not "intrastate" service, i.e. the program did not prescribe any rates for local service, facilities and carrier-supplied terminal equipment. 552 F.2d at 1047-1048.

The Court of Appeals for the District of Columbia reasoned that since Sections 152(a) and (b) of the Act allocated Federal and State authority for both "charges" and "facilities," "conflicting federal and state regulations regarding dual use CPE are no more acceptable

under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the NCUC cases." Computer II, 693 F.2d at 216. As previously argued, the Court may not be convinced that the alleged conflict has been adequately supported with factual information. The court of appeals stated on the one hand that it could not engage in whether a price control or free competition policy better serves the public interest but that it could only determine the FCC's statutory authority. Yet it closely looked at the Computer II scheme, alleged Federal-State conflicts in regulations, and perceived competitive effects in expanding the notion of the FCC's ancillary jurisdiction or at least the exercise thereof.

With its additional recognition and concern that the telecommunications field is "volatile," a type of policy analysis appears clearly at work. However, since the court of appeals failed to deal head on with the finding by the Fourth Circuit that State commissions still had discretion to tariff terminal equipment under Section 152(b), its analysis of the NCUC cases is incomplete at best. This conflict between courts of appeal should, therefore, be resolved by the Court's review of this matter. Without it the FCC may further extend its intrusion into the State

regulatory arena as the telecommunications field continues to evolve. This could, in turn, have the additional ramification of adversely affecting the financial ability of consumers to maintain telephone service.

CONCLUSION

For the foregoing reasons, the Department as amicus curiae urges this court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia in order to review this matter of grave national importance.

Respectfully submitted,

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